

STATE OF MICHIGAN  
IN THE SUPREME COURT

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Appeal from the Court of Appeals  
Docket No. 217991

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KAY WILKIE, Personal Representative  
of the Estate of PAUL K. WILKIE, Deceased,  
and JANNA KAY FRANK,

Plaintiffs-Appellees

119295  
Docket No. 11925

v.

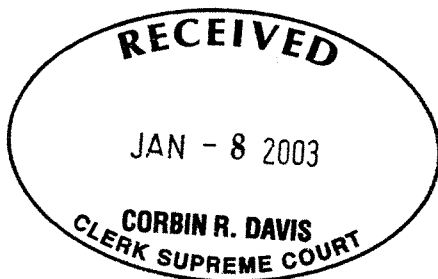
AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant

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**APPELLEE FRANK'S BRIEF ON APPEAL**

**ORAL ARGUMENT REQUESTED**



GRUA, JAMO AND YOUNG, P.L.C.  
Jonathan E. Maire (P-16999)  
Attorneys for Plaintiff-Appellee Frank  
2401 E. Grand River Ave.  
Lansing, MI 48912  
(517) 487-8300

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## TABLE OF CONTENTS

Index of Authorities	iii
Statement of the Basis of Jurisdiction	vi
Statement of Questions Involved	vii
Concise Statement of Facts and Proceedings and Appendix	1
Argument	2
A. THE POLICY PROVISION AT ISSUE IS AMBIGUOUS AND THEREFORE TO BE CONSTRUED AGAINST THE INSURER AND IN FAVOR OF COVERAGE	2
1. Ambiguity arising from Policy's use of the phrase "The Underinsured Motorist Coverage limits stated in the Declarations . . ."	3
2. Ambiguity arising from the phrase "the limits of all bodily injury policies <i>available</i> to the owner or operator of the underinsured automobile"	6
3. Ambiguity arising from the Policy's definition of an "underinsured automobile"	10
4. Ambiguity arising from prefatory phrase "Our limit of liability for Underinsured Motorist Coverage"	11
B. THE POLICY PROVISION AS INTERPRETED BY THE DEFENDANT-APPELLANT IS AGAINST PUBLIC POLICY AND THEREFORE EVEN IF UNAMBIGUOUS WOULD BE INVALID	13
1. Contravention of the principle of distribution provided in the no-fault act	14
2. Contravention of the public policy of providing full compensation to accident victims	17
3. All jurisdictions support the public policy inherent in Plaintiff's position	19

C. THE REASONABLE EXPECTATIONS DOCTRINE REMAINS VIALE IN MICHIGAN AS AN ‘ADJUNCT’ TO THE AMBIGUITY RULE AND AS AN AID TO THE CONSTRUCTION AND INTERPRETATION OF POLICY PROVISIONS	23
1. The Court of Appeals did not rely on the rule of reasonable expectations in arriving at the result	23
2. The rule of reasonable expectations continues to be applied in Michigan and would in these circumstances result in the rejection of the Auto-Owners interpretation of the policy provision	24
a. The development of the rule of reasonable expectations	24
b. The reasonable expectations rule in Michigan	28
Relief Requested	35

## INDEX OF AUTHORITIES

Cases:	Page:
<i>Austin Mutual Ins. Co v King</i> 29 F3d 385 (CA*, 1994)	21
<i>Auto Club Ins Ass'n v DeLaGarza</i> 433 Mich 208; 444 N.W.2d 893 (1989)	2
<i>Auto-Owners v Churchman</i> 440 Mich 560; 489 N.W.2d 431 (1992)	2,10,13
<i>Auto-Owners Ins Co v Leefers</i> 203 Mich App 5; 512 N.W.2d 324 (1993), Lv den 445 Mich 939; 521 N.W.2d 608 (1993)	6, 7, 8, 9
<i>Auto-Owners Ins Co v Lydon</i> 149 Mich App 643; 386 N.W.2d 628 (1986); Lv den 428 Mich 887; 403 N.W.2d 805 (1987)	16
<i>Bianchi v Automobile Club of Michigan</i> 437 Mich 65; 467 N.W.2d 17 (1991)	2
<i>Bradley v Mid Century Ins Co</i> 409 Mich 1; 294 N.W.2d 141 (1980)	16
<i>Farm Bureau Insurance Co. v Nikkel</i> 460 Mich 558; 596 N.W.2d 915 (1999)	2, 28, 29
<i>Francis v Travelers Ins Co</i> 581 So2d 1036 (La. App. 1991)	21
<i>Gonzales v Millers Casualty Co</i> 923 F2d 1417 (CA 10, 1991)	21
<i>Goughan v Rutgers Casualty Ins Co</i> 238 NJ Super 644; 570 A2d 501 (1989)	21
<i>Gray v Zurich Insurance Co.</i> 65 Cal 2d 263; 419 P 2d 168 (1966)	24
<i>Gust v Otto and Mutual Service Casualty Ins Co</i> 147 Wis 2d 560; 433 NW2d 286	21
<i>Hoffman v United Services Auto Ass'n</i> 671 F. Supp 922 (D. Conn. 1987)	7
<i>Husted v Auto-Owners Ins Co</i> 459 Mich 500; 591 N.W. 2d 642 (1999)	14
<i>Max Tree Plastering Co. v United State Fidelity and Guaranty Co.</i> 912 P 2d 861 (Okla. 1996)	23
<i>Powers v DAIIE</i> 427 Mich 602; 398 N.W.2d 411 (1986)	2, 26, 27
<i>Providence Hospital v Morell</i> 431 Mich 194; 427 N.W.2d 531 (1988)	17

<b>Cases:</b>	<b>Page:</b>
<i>Raska v Farm Bureau Ins Co</i> 412 Mich 355; 314 N.W.2d 440 (1982)	10, 13, 24, 25
<i>Schroeder v Farmers Insurance Exchange</i> 165 Mich App 506; 419 N.W.2d 9 (1987)	16
<i>Shelby Mutual Ins Co v United State Fire Ins Co</i> 12 Mich App 145; 162 N.W.2d 676 (1968)	2
<i>Singer v American States Insurance</i> 245 Mich App 370; 631 N.W.2d 34 (2000)	10
<i>State Farm Ins Co v Braun</i> 783 P2d 253 (Mont., 1990)	22
<i>State Farm Mutual Automobile Ins Co v Messinger</i> , 232 Cal App 3d 508; 283 Cal Rptr 493 (1991)	19, 20
<i>State Farm Mutual Automobile Ins Co v Ruuska</i> 412 Mich 355; 314 N.W.2d 184 (1982)	24, 25
<i>State Farm Mutual Ins Co v Valencia</i> 120 NM 662; 905 P2d 202 (1995)	21
<i>Trzaskos v State Farm Mut Automobile Ins Co</i> . 28 Conn. L. Rptr 480; 2000 WL 1889726 (2000)	19, 21
<i>Vanguard Ins Co v Clarke</i> 438 Mich 462; 475 N.W.2d 48 (1991)	2, 13, 27, 28
<i>Zulakis v Auto-Owners Ins Co</i> 2001 Mich. App. LEXIS 1874	12
<i>Zurich Insurance Co v Rombough</i> 384 Mich 228; 180 N.W.2d 778 (1970)	24
 <b>Statutes:</b>	
MCLA 500.3101	14
MCLA 500.3131	14
MCLA 500.3009	5, 14

<b>Other Authorities:</b>	<b>Page:</b>
<i>A Critique of the Reasonable Expectations Doctrine</i> 56 University of Chicago Law Review 1461	22, 23
<i>7 Am Jur 2d "Automobile Insurance"</i>	17, 18
<i>Judicial Rationales in Insurance Law; Dusting off the Formal For the Function</i> 52 Ohio State Law Journal 1037 (1991)	13, 23
<i>Pennsylvania's Reasonable Expectations Doctrine: The Third Circuit's Perspective</i> 45 Villanova Law Review 581	21
<i>Protecting the Insured in Utah: Rethinking the "Interstitial" Approach of Allen v Prudential Property and Casualty Insurance Co</i> 12 BYU Journal of Public Law 389	23
<i>Validity and Construction of Provision of Uninsured or Underinsured Motorist Coverage that Damages Under the Coverage will be Reduced by Amount of Recovery from Tortfeasor</i> , 40 ALR 5th 603	17

## **STATEMENT OF THE BASIS OF JURISDICTION**

Plaintiff- Appellee Janna Frank concurs with the Defendant-Appellant's  
Statement of the Basis of Jurisdiction.

## **STATEMENT OF QUESTIONS INVOLVED**

### **1. WHETHER THE POLICY PROVISION AT ISSUE IS AMBIGUOUS AND THEREFORE TO BE CONSTRUED AGAINST THE INSURER AND IN FAVOR OF COVERAGE**

The Court of Appeals said “Yes.”

Plaintiffs-Appellees say “Yes.”

Defendant-Appellant says “No.”

### **2. WHETHER THE POLICY PROVISION AT ISSUE, AS INTERPRETED BY DEFENDANT-APPELLANT, IS VIOLATIVE OF PUBLIC POLICY AND THEREFORE INVALID EVEN IF UNAMBIGUOUS**

The Court of Appeals did not answer this question

Plaintiffs-Appellees say “Yes.”

Defendant-Appellant says “No.”

### **3. WHETHER THE RULE OF REASONABLE EXPECTATIONS REMAINS VIABLE IN MICHIGAN AS AN ADJUNCT TO THE AMBIGUITY RULE AND AS AN AID TO CONSTRUCTION AND INTERPRETATION OF INSURANCE POLICIES**

The Court of Appeals said “Yes.”

Plaintiffs-Appellees say “Yes.”

Defendant-Appellant says “No.”

### **4. WHETHER THE RULE OF REASONABLE EXPECTATIONS CAN BE OPERATIVE IN SOME CIRCUMSTANCES ABSENT AN AMBIGUITY**

The Court of Appeals did not answer this question.

Plaintiffs-Appellees say “Yes.”

Defendant- Appellant says “No.”

## **CONCISE STATEMENT OF FACTS AND PROCEEDINGS**

Auto-Owners has fairly set forth the facts and proceedings in its Concise Statement, and this Plaintiff adopts and concurs in this statement, with two exceptions:

1. Plaintiff does not adopt, and in fact rejects, Auto-Owners' arguments to the extent that they are stated as facts, e.g., its statement at page 4 of its brief regarding the meaning of its policy provisions, and its statements at page 5, that the opinion of the Court of Appeals is "inconsistent with the principles of contract interpretation" established by this Court.
2. Auto-Owners did not file a counterclaim in this suit, as it states at the bottom of page 4 of its brief.

## **APPENDIX**

This Plaintiff-Appellee does not provide a separate Appendix in this matter as permitted in MCR 7.308, since all relevant materials appear to be included in the appendix furnished by the Defendant-Appellant.

## ARGUMENT

### A.

#### **THE POLICY PROVISION AT ISSUE IS AMBIGUOUS AND THEREFORE TO BE CONSTRUED AGAINST THE INSURER AND IN FAVOR OF COVERAGE**

A provision in an insurance policy is ambiguous “when (it is) capable of conflicting interpretations.” *Bianchi v Automobile Club of Michigan* 437 Mich 65; 467 N.W.2d 17 (1991); *Auto Club Ins Ass’n v DeLaGarza* 433 Mich 208, 213; 444 N.W.2d 803 (1989); *Farm Bureau Ins Co v Nikkel* 460 Mich 558, 566; 596 N.W.2d 915 (1999). Any ambiguity in an insurance policy drafted by an insurer is to be construed against the insurer and in favor of the insured. *Bianchi*, supra; *Powers v DAIIE* 427 Mich 602; 398 N.W.2d 411 (1986).

These rules have been given especially strict application where the provision in question operates to exclude a coverage ostensibly furnished by the policy, as does the phrase at issue in this litigation. *Auto-Owners v Churchman* 440 Mich 560, 567; 489 N.W.2d 4332 (1992), citing *Shelby Mutual Ins Co v. United States Fire Ins Co* 12 Mich App 145,149; 162 N.W.2d 676 (1968). As this Court stated in *Churchman*:

We have placed a heavy burden on the insurer to draft exclusionary clauses in clear language comprehensible to lay persons for an exclusion to be operative against the insured. *Id.*, in concurring opinion of Justice Riley, at 576, citing *Metropolitan Property and Liability Ins Co v DiCicco* 432 Mich 656; 443 N.W. 2d 734 (1989).

And in *Vanguard Ins Co v Clarke* 438 Mich 463, 472; 475 N.W.2d 48 (1991), this Court confirmed that it would “strictly construe against an insurer exceptions in an insurance policy that preclude coverage for the general risk.” (citing *Pietrantonio v Travelers Ins Co* 282 Mich 111, 116; 275 N.W.2d 786 (1937)).

With those principles in mind, we turn to the policy provision which is the subject of this suit, and find at least four respects in which it is ambiguous, and therefore to be construed in favor of coverage:

**1. Ambiguity arising from Policy's use of the phrase "The Underinsured Motorist Coverage limits stated in the Declarations . ."**

An ambiguity results from the policy's language in the **LIMIT OF LIABILITY** clause which purports to define the sum from which the tortfeasor's limits are to be deducted.

The policy defines this sum as "the amount by which **the Underinsured Motorist Coverage limits stated in the declarations . .**"

It fails to address what those "Underinsured Motorist Coverage limits" *are* in a multiple claimant situation. But it does, however, make reference to the **Declarations** as the *source* for determining those limits.

The declarations specify that in multiple claimant situations **each injured party** is entitled to recover up to \$100,000 for his or her injuries.

It would be a reasonable assumption, therefore, that the "Underinsured Motorist Coverage limits stated in the Declarations" would be the **sum** of those limits that would be available to all "injured persons," subject only to the undisputed maximum aggregate limit of \$300,000 per occurrence.

This interpretation is, in fact, more tenable than the interpretation argued for by Auto-Owners in its brief (page 10), wherein it argues that *each* claim is to be considered *separately*, and the tortfeasor's limits applied *separately* to each claim.

The fact is that Auto-Owners, in this underinsured motorist coverage, has promised to indemnify **all** potential claimants, up to the sum of \$100,000 each. If there are two claimants, its promise is worth up to \$200,000; if three or more its promise – in view of the aggregate limit per occurrence – is worth up to \$300,000. From this total exposure would be deducted the tortfeasor’s liability limits. That Auto-Owners is entitled to have these limits deducted from the value of its obligation to indemnify, or these limits imposed on the recovery of all injured parties, only **once** is the most logical conclusion that can be had.

In this case, Auto-Owners has agreed to indemnify **each** “injured person” to a maximum of \$100,000. There being here two “injured persons,” each with claims in excess of \$100,000, it has agreed to indemnify these injured persons for \$200,000, reduced by the amount of Ward’s coverage. Its promise to indemnify all injured persons is therefore worth \$150,000.

Auto-Owners, on the other hand, is arguing in effect that its obligation to indemnify **each injured person** is worth less than the per person coverage called for in its declarations. This position may be arguable, but it is just that: arguable. When considered in the light of the economic realities of the multiple claimant situation, its argument is a weaker argument than that it is the sum of its obligations to **each** injured party that constitutes the “Underinsured Motorist Coverage limits stated in the Declarations.” This is the phrase that Auto-Owners has chosen to use in its policy, and this phrase at the very least gives rise to an ambiguity.

The Auto-Owners interpretation loses sight of the fact that in this case the \$50,000 limits of the tortfeasor was a *per occurrence* limit as well as a *per person* limit.

In most cases, the tortfeasor's coverage would be split-limit coverage, such as the 20,000/40,000 limits mandated by the No-Fault Act.<sup>1</sup> If the Ward vehicle had had this coverage, there is no question but what each plaintiff would have received a total of \$100,000 under the UIM endorsement, since the per person coverage available to the tortfeasor to satisfy the claims of each would have been \$20,000, resulting in an obligation on the part of Auto-Owners to pay the remaining \$80,000.

Represented graphically, the two cases may be illustrated as follows:

**Case A:**

Two persons are injured in a motor vehicle collision.  
Both Plaintiffs have 100/300 in UIM coverage.  
The owner/operator of the vehicle at fault has 20/40 limits of bodily injury coverage.  
Each injured person receives 20,000 from the owner/operator's coverage.  
Each injured person receives \$80,000 under the UIM coverage.  
Result: Each injured person has received the full \$100,000 in compensation.

**Case B:**

Two persons are injured in a motor vehicle collision.  
Both Plaintiffs have 100/300 in UIM coverage.  
The owner/operator of the vehicle at fault has 40,000 single limit coverage.  
Each injured person receives \$20,000 from the owner/operator's coverage  
(Under Auto-Owners' interpretation) each injured person recovers only \$60,000 under the UIM coverage.  
Result: Each insured person is deprived of \$20,000 in compensation.

That is to say, it is Auto-Owners' contention that where, as here, a per person limit is actually **higher** (\$40,000 in the example of Case B) than in the policy of a minimally insured tortfeasor (\$20,000), the UIM recovery must be **reduced**, in this case, from \$80,000 to \$60,000. It is its claim that the fact that the tortfeasor's limits are single limits rather than the usual split limits that results in this anomaly. But it is at least as reasonable in the case where the tortfeasor has a single limit policy to employ the *per occurrence*

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<sup>1</sup> MCLA 500.3009(1), as incorporated in the No Fault Act by MCLA 500.3131(2).

limits of both coverages to determine the amount of UIM coverage afforded by the policy.

One of the arguments made by Auto-Owners for its interpretation is that it will provide more “predictability” in the underwriting of its coverages (see Argument III C.2 at pages 40-41, Auto-Owners brief). To the contrary, as the above illustration shows, its interpretation leaves the level of its exposure at the mercy of the option of tortfeasors to elect single or split limit coverage, hardly an underwriting advantage.

**2. Ambiguity arising from phrase “the limits of all bodily injury . . . policies available to the owner or operator of the underinsured automobile.”**

First, the term “available” requires a context for its meaning. Some words are self-referential: their meaning can be gleaned from the word alone. “Available” is not such a word. It cannot be thought of absent some context by which it is given meaning. That context must answer the question: Available for what purpose?

Definitions of the term appearing in the dictionary make reference to its context:

“Having sufficient power or force *to achieve an end* . .

“Capable of use for the accomplishment of *a purpose* . .

“At disposal; esp. for *sale* or *utilization* . .”

(Webster’s Third New International Dictionary)

The point is made well in one of the cases cited by the Court of Appeals in *Auto-Owners Ins Co v Leefers* 203 Mich App 5; 512 N.W.2d 324 (1993), *lv den* 445 Mich 939; 521 N.W.2d 608 (1994):

“The word ‘available’ could mean anything from ‘in hand’ or ‘actually received’ to ‘within reach’ or ‘conceivably obtainable.’ Webster’s Third World New International Dictionary at 150 (1981) defines available as what is accessible or

obtainable. What is available, or accessible or obtainable, can range widely depending on what conduct or events are necessary to bring the tangible object into possession or the intangible objective to fruition. As the extent of those events or conduct is not defined, the word is ambiguous.” *Hoffman v. United Services Auto. Ass’n* 671 F. Supp 922 (D. Conn. 1987), at 924-925)

The court goes on to cite cases determining that “because of the ambiguity of the term,” it is to be “construed strictly against the insurer,” and concludes that the “better and more reasoned approach” is to construe the term to refer to “funds which were obtainable or within the legal reach of the insured.”

With this in mind, the question posed by the language in question is: “Available to the owner or operator of the underinsured automobile” *for what purpose*? The obvious purpose can be simply stated: for the satisfaction of the claims of injured parties. Anyone reading this language would reach this conclusion. Yet under Auto-Owners’ interpretation the legitimate claims of these claimants go unsatisfied.

In *Auto-Owners v. Leefers*, *supra*, the meaning of the word “available” was discussed at great length. The issue was whether or not one of the claimants injured – Keysha Cash - was precluded from recovering under the UIM coverage of the owner of the car in which she had been riding (the Leefers vehicle), where it denied coverage if the insured “has insurance similar to that under this policy and such coverage *is available to the insured*.” (emphases added). Keysha’s grandfather also had UIM coverage which contained an identical clause, and she evidently met the definition of an “insured” under that coverage. It was the argument of the Leefers that Keysha was not covered under their UIM policy because she had similar coverage available to her through her grandfather’s policy, and was thereby precluded from recovering under the Leefers policy because of its “other insurance” clause. Because Auto-Owners wrote both policies, it took the

position (a) that coverage under the Leefers policy *was* “available” to her, and (b) coverage under her grandfather’s policy was *not* available to her because of its “other insurance” clause. The exposure of Auto-Owners would, under its argument, be limited to the UIM limits of the Leefers policy. The Court of Appeals adopted Auto-Owners’ argument, on the basis of the meaning of “available,” holding that the term was ***ambiguous*** and saying:

In the instant case, we are faced with the task of construing an exclusion containing the term ‘available.’ While no court in this state has specifically construed this term, courts of foreign jurisdictions have done so. (Citing cases). Each of those courts concluded that *the term is ambiguous and is to be construed against the insurer*. . . Each of the courts also concluded that the term ‘available,’ when construed in favor of the insured, meant ‘*actually* available,’ or ‘accessible,’ or that which is reasonably available, as opposed to that which is *theoretically or hypothetically* available. . .

In the instant case, we agree that *the term ‘available’ is ambiguous*, inasmuch as it is *capable of being defined in different ways*. . . Moreover, we agree with those jurisdictions cited above that have construed the term to mean *that which is ‘actually’ or ‘reasonably’ available to the insured*. (Emphases added)

The court affirmed the denial of benefits to Keysha Cash, because she had not established that the UIM coverage in the Leefers policy was not “available” to her, i.e., she could not establish that the other insurance clause in her grandfather’s policy was inapplicable.

Auto-Owners attempts to distance itself from the Court of Appeals’ ruling in *Leefers* on the basis that the term “available” in the “other insurance” clause modified the phrase “(available) *to the insured*” rather than – as here – “(available) *to the owner or operator*” of the vehicle at fault. But a fair reading of *Leefers* does not make its determination that the word “available” depends in the least upon whether the “availability” applies to the coverage of the insured or the coverage of the tortfeasor. The

key point was that the term *is ambiguous* in a context in which availability can be *actual* or *hypothetical* availability. It determined that in such a context the term was ambiguous and should therefore be construed against the insurer. Keysha Cash's claim was defeated because the proceeds of the Leefers' UIM coverage were *actually* and not *hypothetically* available to her, triggering the limitation imposed by the "other insurance" provision of her grandfather's UIM coverage.

Auto-Owners' contention that the many cases, such as *Leefers* and the cases from other jurisdictions referred to in the Court of Appeals' opinion, are inapposite because the "availability" referred to in those cases was to be applied to coverage available to the "insured" rather than – as in this case – to the tortfeasor, is simply wrong.

In reality, this claimed distinction is, as the Court of Appeals said, a "distinction without a difference." For it simply is the case that what is available to the tortfeasor *is* what is available to the "insured" under the UIM coverage. In this case what is available to the Ward estate is the sum of \$50,000 with which to compensate all claimants. The Ward estate obviously cannot compensate **both** claimants in the amount of \$50,000. It exhausted all limits available to it by paying each claimant the sum of \$25,000. The sum of \$25,000 is all that was available to the Ward estate for the purpose of satisfying each of these claims.

It is of some interest that it was the present defendant, Auto-Owners, which was the writer of both coverages in *Leefers*. Evidently the Court's finding that the term "available" was ambiguous and to be construed against it did not prompt it to clarify that term in subsequently issued policies. It would have been a simple matter to articulate what Auto-Owners claims was intended by the provision, by simply adding language to

the effect that the total limits of all liability insurance available to the owner or operator of an underinsured automobile would be set off against the recovery of *each claimant* where there was more than one claim.

### **3. Ambiguity arising from the policy's definition of an "underinsured automobile"**

In determining whether a clause or term in an insurance policy is ambiguous, the *entire* contract is to be consulted, not just the clause or term at issue. *Raska v Farm Bureau Ins Co* 412 Mich 355, 361; 314 NW2d 440 (1982). An insurance policy must be read as a whole and meaning given to *all* its terms. *Singer v American States Insurance* 245 Mich App 370; 631 N.W.2d 34 (2000); *Auto-Owners Insurance Co. v Churchman*, *supra*, at 566. If one clause or term in one part of the policy gives rise to one "reasonable understanding" that is in conflict with a clause or term in another part of the policy, the policy is said to be ambiguous.

In the definitional section of the UIM endorsement, an **underinsured automobile** is defined as an automobile to which a liability policy applies at the time of the occurrence "in which the limits of liability are less than the amount of damages the injured person is **legally entitled to recover** for bodily injury."

A key phrase in this definition is the phrase "**legally entitled to recover.**" It should be clear from this language that it is a real **recovery** and not some hypothetical but practically impossible "recovery" that is to apply in determining whether an automobile is "underinsured."

If there were but one "res," one sum of money available for distribution between A and B, the phrase "legally entitled to recover" would be nonsense if there were no

possibility of both A and B realizing that sum. The very meaning of “legal entitlement” depends upon there being a legal possibility of recovery. Two people cannot be said to be “legally entitled” to the very same *res*. It is a logical *non sequitur* to claim that several different parties have the “legal entitlement” to the recovery of the very same property. Even Solomon found it necessary to decree that the baby be cut in half.

In this case, the *res* is the \$50,000 limits of the Ward policy. Under Auto-Owners’ interpretation, it must be established that the Wilkie estate and Janna Frank are **each** “legally entitled” to the \$50,000, a manifest impossibility.

In reality, the “legal entitlement” to that sum can be determined only in a legal proceeding in which each could be logically awarded part or all of it, but under no conceivable circumstance could both be “legally entitled” to it.

In fact, Auto-Owners recognized this manifest impossibility when it gave its consent to the settlement between the Ward estate and these two claimants.

Consequently, even if Auto-Owners were correct in its interpretation of Section 4.a(1) of the policy, that interpretation is contradicted by another section in the same endorsement, giving rise to an ambiguity.

#### **4. Ambiguity arising from prefatory phrase “Our limit of liability for Underinsured Motorist Coverage . . .”**

Auto-Owners in its brief sets forth the interpretation which it claims should govern the determination of its limit of liability:

“ . . . Auto-Owners contends that **each Plaintiff** starts with \$100,000 in underinsured motorist coverage as a result of the accident. From that \$100,000, Auto-Owners then determines the maximum extent of its liability pursuant to Section 4 of the policy, ‘Limit of Liability.’ In this case, Auto-Owners’ liability to

**each claimant** shall not exceed the lowest of the amount by which the underinsured motorist coverage limits stated in the Auto-Owners declaration sheet (i.e., \$100,000 per person) exceeds the ‘total limits of all bodily injury bonds and policies available to the owner or operator of the underinsured vehicle.’” (Page 4, Auto-Owners brief; emphases added).

The policy is silent as to situations like this one in which there are multiple claimants.<sup>2</sup> Nowhere in the LIMIT OF LIABILITY section does it employ the terms **now** argued for by Auto-Owners in its brief, highlighted in the above excerpt from its brief: “each Plaintiff,” or “each claimant.”

In other words, it failed to employ in its policy those terms which it would now superimpose on the language of the endorsement. It would have been a simple matter to have incorporated those terms, saying for example: “Our limit of liability **to each injured person** for Underinsured Motorist Coverage shall not exceed . . .” Instead, it simply said “Our limit of liability **for Underinsured Motorist Coverage** shall not exceed . . .” It seems clear from that language that its limits relate not to the claims of individual claimants, but to the claims of all those making claim “for underinsured motorist coverage.”

Finally, it should be noted that another panel of the Court of Appeals, confronted with the exact clause that is at issue in this appeal, concurred with the panel deciding this case in *Zulakis v Auto-Owners Insurance Co* 2001 Mich. App. LEXIS 1874 (unpublished) at 17-18.

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<sup>2</sup> The only breaking of the silence regarding multiple claimants appears in the “per person” limits in the declaration sheet, discussed in sub-section 1 above.

**B.**

**THE POLICY PROVISION AS INTERPRETED BY AUTO-OWNERS IS  
AGAINST PUBLIC POLICY AND THEREFORE EVEN IF UNAMBIGUOUS  
WOULD BE INVALID**

This Court has always followed the principle that insurance policy provisions, even if unambiguous, are invalid if contrary to public policy. This caveat, or something like it, has always appeared in the Court's decisions in which the ambiguity of insurance policies is at issue: "(A)ny clause in an insurance policy is valid as long as it is clear, unambiguous, *and not in contravention of public policy.*" *Raska v Farm Bureau Mutual Ins Co of Michigan* 412 Mich 355, 361-362; 314 N.W.2d (1982). See also *Auto-Owners Ins Co v Churchman* 440 Mich 560, 566; 489 N.W.2d 431 (1992); *Vanguard Ins Co v Clarke* 438 Mich 463, 471; 475 N.W.2d 48 (1991) ("In the absence of ambiguity, this Court will uphold the clear meaning of an insurance contract *that does not violate public policy.*")

The test for determining whether a policy or provision in a policy "violates public policy" has been stated as follows:

The test of whether or not an insurance contract is void as against state public policy is whether it is injurious to the public or contravenes some important established societal interest, or when its purpose is to promote, effect, or encourage a violation of law. Article: *Judicial Rationales in Insurance Law: Dusting Off the Formal for the Function* 52 Ohio State Law Journal 1037, 1062; Prof. Peter Swisher, 1991.

There are at least two respects in which the policy provision as interpreted by Auto-Owners would violate public policy:

### 1. Contravention of the principle of distribution provided in the No Fault Act:

While the no-fault Act (MCLA 500.3101 et seq.) does not mandate either uninsured or underinsured residual liability insurance, it does clearly require that owners of all registered vehicles have residual bodily injury liability insurance that will protect any negligently injured party in an amount of not less than \$20,000. The no-fault act, and specifically MCLA 500.3101(1) provides:

The owner or registrant of a motor vehicle required to be registered in this state *shall* maintain security for payment of benefits under personal protection insurance, property protection insurance, *and residual liability insurance*.

“Residual liability insurance” is described in MCLA 500.3131(1):

Residual liability insurance shall cover bodily injury and property damage which occurs within the United States, its territories and possessions, or in Canada. *This insurance shall afford coverage equivalent to that required as evidence of automobile liability insurance under the financial responsibility laws of the place in which the injury or damage occurs. In this state this insurance shall afford coverage for automobile liability retained by section 3135.*

As noted by this Court in *Husted v Auto-Owners Ins Co* 459 Mich 500; 591 N.W. 2d 642 (1999), MCLA 500.3131(2) incorporates into the no-fault act, in implementation of the section just quoted, the requirement of the financial responsibility laws found in MCLA 500.3909(1), which provides:

An automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for property damage, bodily injury, or death suffered by *any person* arising out of the ownership, maintenance, or use of a motor vehicle shall not be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless the liability coverage is subject to a limit, exclusive of interest and costs, of not less than \$20,000 because of bodily injury to or death of *1 person* in any 1 accident, and subject to that limit *for 1 person*, to a limit of not less than \$40,000 because of bodily injury to or death of 2 or more persons in any 1 accident . (emphases added).

In other words, the no-fault act requires that there be coverage for bodily injury available to *every person* injured in an automobile accident caused by another in this state.

But as has been demonstrated above, if the Auto-Owners interpretation of the policy provision at issue is accepted, there can be situations in which the policy evinced by these provisions of the no-fault act and the financial responsibility law grafted into the no-fault act will be defeated. If, for instance, a tortfeasor had a \$40,000 single limit liability policy and the UIM coverage were the same as is required of residual liability insurance by the statute (20/40,000), under the Auto-Owners interpretation if more than two persons were injured none of the injured parties would be entitled to any recovery under the UIM coverage, because the tortfeasor's \$40,000 limit would exceed the \$20,000 limit on the claim of each injured party. Their recovery would be exclusively from the tortfeasor's insurer, which would necessarily – because only \$40,000 would be available for distribution to three persons - be less than the per person coverage they would otherwise, under the Plaintiffs' interpretation, have received under the UIM coverage. Under the Plaintiffs' interpretation, the goal of the no-fault provisions discussed above would be met, because each injured party would recover the \$20,000 ostensibly promised under the UIM endorsement: from each injured person's per person indemnification under the UIM coverage would be deducted only that which each received from the tortfeasor's insurance. Stated in mathematical terms:

TF: single limit liability policy of \$40,000.

A, B, and C: each sustaining injuries in excess of \$20,000 and each recovering from TF's insurer the sum of \$13,333, totaling TF's limits.

A,B, and C present claims under the UIM coverage to their insurer.

**Under Auto-Owners interpretation:**

UIM limits stated in the Declarations for each claim: \$20,000

Less: Total limits of coverage “available to” TF: \$40,000.

Result: No recovery under UIM policy for any of the injured parties.

**Under Plaintiffs’ interpretation:**

UIM limits stated in the Declarations for each claim: \$20,000

Less: Total amount available to tortfeasor for satisfaction of each person’s claim: \$13,333

Result: Each injured party receives \$6,667 under the UIM coverage, bringing their total recovery to the \$20,000, the goal of the no-fault act.

The illustration demonstrates the real difference between the scheme underlying the Auto-Owners interpretation and the scheme of the no-fault act: the theory behind the no-fault act being to assure that each injured party receives not less than the sum specified,<sup>3</sup> while the theory behind the Auto-Owners interpretation is to use the entire per occurrence limit to reduce the recovery of each party.

While it is true that the no-fault act does not require uninsured or underinsured coverage *per se*, it has been recognized in this state that these coverages are *substitutes* for the residual bodily injury liability coverage that *is* required by the statute. *Auto Owners Ins Co v Lydon* 149 Mich App 643, 650-651; 386 N.W.2d 628 (1986), *lv den* 428 Mich 887; 403 N.W.2d 805 (1987); *Bradley v Mid-Century Ins Co* 409 Mich 1, 60-66; 294 N.W.2d 141 (1980); *Schroeder v Farmers Ins Exchange* 165 Mich App 506; 419 N.W.2d 9 (1987). That being the case, its scheme of distribution should be required to conform to the mandates of the no-fault act. It cannot be a true substitute for the insurance required by the act if Auto-Owners’ interpretation is correct.

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<sup>3</sup> The Plaintiffs understand, of course, that the total of their claims would be subject to the per occurrence limit, resulting (in the absence of UIM coverage) in their recovery being less than \$20,000, as depicted in the example. But the illustration is offered to demonstrate that the principles of distribution argued for by Auto-Owners are fundamentally at odds with the principles of the no-fault act, and are therefore against public policy.

## 2. Contravention of the public policy of providing real compensation to accident victims

The policy provision as interpreted by Auto-Owners contravenes the legitimate public policy of providing real compensation to accident victims. The “public policy” that will override the provisions of a policy is not confined to statutes, but includes fundamental issues of fairness and equity. See *Providence Hospital v Morrell* 431 Mich 194; 427 N.W.2d 531 (1988).

It is everywhere recognized that the purpose of such clauses limiting the insurer’s liability under uninsured and underinsured coverage is the avoidance of the windfall of a double recovery by the insured. In an extensive annotation on the subject appearing in ALR 5<sup>th</sup>, this is recognized:

“These types of clauses are primarily designed to avoid the insured party getting a double recovery for the same damages from both a liability insurer and an uninsured/underinsured motorist carrier. . .

“(These clauses) seek, in a variety of situations, to avoid having the insured get paid double for the same damage or injury. . . Since the purpose of uninsured and underinsured motorist insurance is to place the insured in the same position he or she would have been in had the tortfeasor been adequately insured, the setoff clause for tortfeasor recoveries accomplishes this by having the insurer pay only what is necessary, above and beyond **the amount paid** by the tortfeasor, to have the insured **fully** recompensed for any injuries or damages.” 40 ALR 5<sup>th</sup>, Annotation “*Validity and Construction of Provision of Uninsured or Underinsured Motorist Coverage that Damages Under the Coverage Will be Reduced by Amount of Recovery from Tortfeasor*,” p. 603; emphases added).

And in another text:

“(The purpose of uninsured and underinsured coverage) has been said to be to place an injured party who was in a collision with an uninsured motorist in the same position, or substantially the same position, that he or she would have been in if the uninsured motorist had been properly insured.” 7A Am Jur 2<sup>nd</sup> “Automobile Insurance”, Section 311, p. 28.

These comments and the cases surveyed indicate a strong public policy having two aspects: (1) an insurer should not be required to pay more than once for the same injury, and (2) the insurer should be required to make the insured whole, which entails placing insured parties in as good a position as they would have been in had the tortfeasor had the coverage limits contained in the UIM coverage obtained by the insured.<sup>4</sup> That these requirements have the status of “public policy” was intimated in *Vanguard*, supra, where the Court indicated that it “perceived no compelling policy rationale to adopt the double causation theory” urged by the insured. The Court in a footnote indicated that “although no rule of law specifically prohibits recovery under multiple policies, it has been noted that ‘(i)f an insured’s injury is such that the payment of insurance under two or more coverages will produce a duplicate recovery, the result contravenes the principle that insurance is intended as no more than indemnity against loss.’ (citing Keeton & Widdiss, n. 7, supra, at 560.” As much as there is a policy against *double* recovery, there is a public policy for “single” recovery.

And in another section of that same text quoted above it is stated:

“Where the tortfeasor’s full liability policy limits are **not available** to an insured, the UM insurer is entitled to a credit **only** for the liability coverage available to the insured, rather than the entire amount of the liability insurance of the tortfeasor . . . This rule applies in cases where the full policy limits are unavailable due to multiple claimants . . .” Supra, Section 461, p. 261; emphases added.

And again from that text:

“Sometimes there are multiple claimants on the liability policy and the claimant does not or cannot receive the entire dollar limits of this policy. Accordingly, in some cases a reduction clause does not reduce the UIM limit on one policy by the entire dollar limit of a liability policy, where the claimant could only receive a portion of the liability policy proceeds due to the existence of multiple claimants,

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<sup>4</sup> Both of these requirements are set forth as a matter of public policy in the cases cited by Auto-Owners in its brief (See 3., below).

but rather the credit is the amount available or paid to the claimant.” Supra, Section 480, pp 289-290.

### **3. All cases from other jurisdictions support the public policy inherent in Plaintiffs-Appellees’ position**

Auto-Owners, in its brief (pp 19-21), relies on two cases from other jurisdictions as supportive of its claim that public policy favors its interpretation of the policy language: *State Farm Mut Automobile Ins Co v Messinger* 232 Cal App 3d 508; 283 Cal Rptr 493 (1991), and *Trzaskos v State Farm Mutual Automobile Ins Co* 28 Conn. L. Rptr. 480; 2000 WL 1889726 (2000).

In *Messinger*, three persons were injured in the vehicle covered by the UIM endorsement in the State Farm policy, which endorsement carried limits of \$100/300,000. The tortfeasor had a liability policy with a single limit of \$300,000. The insurer of the tortfeasor tendered the entire \$300,000 to the injured parties, who divided the amount among themselves, resulting in a distribution of \$290,000 to one and only \$5,000 to each of the other injured parties covered by the UIM endorsement.<sup>5</sup> The opinion did **not** reach the issue of interpreting the policy’s provisions. Its holding was quite simply that the tortfeasor – because his limits were equal to the “per occurrence” limits under the UIM coverage - was **not an “underinsured”** under either the policy or the statute which defined an “uninsured motor vehicle,” the court stating:

The tortfeasor (Ballard) was insured for a limit of \$300,000 for all injuries arising out of an accident. By simply comparing Ballard’s limits (\$300,000) with the Messinger’s limits (\$300,000), it is clear that Ballard’s car was not an underinsured motor vehicle, as defined by the Insurance Code and the Messinger’s policy . . .

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<sup>5</sup> The opinion does not state the actual amount of damages sustained by each of the injured persons, or by how much the damages of each exceeded the per person limits of the UIM coverage.

Accordingly, the Messinger's underinsured coverage – drafted in language conforming to (the Insurance Code) – was never triggered and they were never entitled to collect *any* underinsurance amount from State Farm. (*Id.*, at 514)

The court in *Messinger* further made it clear that it was ***not*** interpreting policy language, but was instead deciding the issue of whether the tortfeasor's vehicle was underinsured on the basis of the legislative intent behind the statute. The court, while acknowledging the viability of the ambiguity rule in *contract* interpretation, held it was inapplicable to the interpretation of *statutory* language, in which the guiding principle of interpretation was the determination of legislative intent. See *Messinger*, *supra*, at pp 519 ff.

Finally and most importantly **the *Messinger* case enunciates a public policy with which these plaintiffs do not disagree.** After categorizing two views of underinsurance coverage – the “broad coverage” view and the “narrow coverage” view – it announced that it would follow the narrow coverage view. The narrow coverage view, it said, “focuses on placing the insured in the position he or she would have been in if the underinsured motorist had had liability coverage equal to the insured's underinsured motorist limits.” (283 Cal Rptr 501).

Even under this “narrow coverage” view, it is easily seen that the Plaintiffs-Appellees in this case should prevail on grounds of public policy. **For if Mr. Ward, the tortfeasor, had had the coverage limits stated in the UIM coverage procured by the insured (\$100/300.000), each plaintiff would have recovered from Ward the amount of \$100,000.**

In sum, the *Messinger* case not only fails to support Auto-Owners position, it rises up to indict it.

In *Trzaskos*, supra, three people were injured in an accident caused by a vehicle with split limits of liability insurance in the amounts of \$50/100,000. The UIM coverage in the policy of the injured parties was identical: split limits of \$50/100,000.

Again, the issue was not the interpretation of the UIM coverage, but whether the tortfeasor, whose limits were identical to the UIM coverage, was “underinsured” within the meaning of the statute which defined the term.<sup>6</sup> The court concluded that he was not.

But again, in terms of public policy the court in *Trzaskos* cites the principle that “the purpose of underinsured motorist coverage is to put the injured party in the same position – no worse and not better – that the party would have been in had the tortfeasor carried liability insurance equal to or more than the amount of underinsured motorist coverage available to the injured party.” As has already been noted, this principle applied to the instant case results in each of these plaintiffs being compensated in the amount of \$100,000 – the per person limits of the UIM coverage.

In its opinion, the Court of Appeals in the instant case cited several cases from other jurisdictions: *Gust v Otto and Mutual Service Casualty Ins Co* 147 Wis 2d 560, 564; 433 NW2d 286 (1988); *State Farm Mutual Ins Co v Valencia* 120 NM 662, 665; 905 P2d 202 (1995); *Austin Mutual Ins Co v King* 29 F3d 385 (CA 8, 1994); *Francis v Travelers Ins Co* 581 So2d 1036, 1043 (La App 1991); *Goughan v Rutgers Casualty Ins Co* 238 NJ Super 644; 570 A2d 501 (1989); and *Gonzales v Millers Casualty Co* 923 F2d 1417 (CA 10, 1991). These cases are all supportive of the interpretation of the Auto-Owners policy by the trial court and the Court of Appeals and of a strong public policy in

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<sup>6</sup> It should be noted that both cases cited by Auto-Owners in support of its public policy argument were essentially decided not with reference to policy language, but with reference to *statutes* requiring underinsured coverage. This is the very factor on which Auto-Owners claims that the cases cited by the Court of Appeals in its opinion are inapposite. See footnote 4, p 15 Auto-Owners brief)

favor of an insured recovering under a UIM endorsement that amount which she or he would have recovered had the tortfeasor had a policy with the same limits.

Each case has something to offer that is specific to the case at hand. *Goughan*, and *Valencia*, for instance, revolved around the interpretation of a statutory definition of an underinsured vehicle that is essentially identical to the phrase at issue in this case. *Francis*, *Gonzales* and *Gust* involved, as in this case, a tortfeasor with a single limit policy. In *Francis* the court interpreted the term “available” in conformity with the interpretation adopted by the trial court and Court of Appeals in this case, and in *Gonzales* and *Gust*, the courts applied the ambiguity rule to arrive at conclusions favoring the insured parties. See also *State Farm Ins Co v Braun* 783 P2d 253 (Mont., 1990).

Similar cases, supportive of the Plaintiffs-Appellee’s interpretation of the term “available,” were cited by this Court in *Leefers*, *supra* , at 11.

In summary, the Defendant-Appellant is unable to point to a single jurisdiction which would arrive at a result contrary to the Court of Appeals in this case in terms of the public policy favoring s full and fair recovery by these Plaintiffs-Appellees under the underinsured motorist coverage that they bought and paid for.

**C.**  
**THE REASONABLE EXPECTATIONS DOCTRINE REMAINS**  
**VIABLE IN MICHIGAN AS AN ‘ADJUNCT’ TO THE AMBIGUITY**  
**RULE AND AN AID TO THE CONSTRUCTION OF POLICY**  
**PROVISIONS**

**1. The Court of Appeals did not rely on the rule of reasonable expectations to arrive at its result**

Before embarking upon the issues of the existence and form of the “reasonable expectations rule” in Michigan, issues which this Court has requested the parties to address, Plaintiffs-Appellees wish to make it clear that this rule was not determinative of the affirmation by the Court of Appeals of the trial court’s decision, nor was it the principle theory on which the Court of Appeals based its opinion.

Auto-Owners in its brief contends that the Court of Appeals arrived at its finding that the provision at issue was ambiguous *based on* its “imposition” on the contract of the rule of reasonable expectations; that is, its claim is that were it not for the fact that the provision as interpreted by Auto-Owners contravened the reasonable expectations of the insured, the Court of Appeals would have found no ambiguity. It is clear, however, that the Court of Appeals found an ambiguity in the policy provision based upon the same considerations discussed above in Argument A, quite independent of any application of the rule of reasonable expectations. Only after discussing the different interpretations of the policy language giving rise to the ambiguity (page 3 of the Court of Appeals opinion) does the Court of Appeals say “*In addition*, defendant’s position is inconsistent with the reasonable expectations of coverage” (page 3). The viability in Michigan of the rule of reasonable expectations, in any of its forms, is not the hinge upon which the Court of Appeal’s opinion or the outcome of this case depends.

**2. The Rule of Reasonable Expectations continues to be applied in this state and would in these circumstances result in the rejection of the Auto-Owners interpretation of the policy provision**

Nevertheless, because the reasonable expectations rule offers an alternative theory on which the Plaintiffs-Appellees can prevail (and because, of course, this Court has stated in its order granting leave that it should be addressed) it is necessary to consider the current state of the rule of reasonable expectations in this jurisdiction and to determine how it would apply to this case.

**a. The development of the Rule of Reasonable Expectations**

Auto-Owners account of the inception of the rule is quite correct. It did begin with Professor (now Judge) Keeton's analysis of cases construing insurance policy provisions and his attempt to state a "rule" that would adequately summarize the approach taken by the courts. What is erroneous in Auto-Owners argument is its assumption that the rule as formulated by Professor Keeton is *the* rule of reasonable expectations. Before we can speak, as does Auto-Owners, of abolishing or rejecting "the" rule of reasonable expectations, it must be made clear that it has taken different forms and shapes since its original formulation by Professor Keeton. It must then be determined which form of the rule has found acceptance in this jurisdiction.

Learned scholars since the original formulation of the rule have made numerous attempts to "take apart," that is, to analyze, the jurisprudential output of what Professor Keeton had "put together." Their evaluations and critiques have generally taken the approach of dividing into categories the different forms of the rule extant in the various jurisdictions of this country.

Keeton himself recognized that there were three principles primarily responsible for the development of the rule: (1) the unconscionable advantage of the insurer; (2) the reasonable expectations of the insurance applicants; and (3) detrimental reliance by the insured upon the representations of the insurer's agents. While these principles had theretofore been implemented by courts in various and sundry ways under the rubrics of waiver, estoppel, election, rescission, and modification, Keeton believed it to be more straightforward to bring these various approaches together under what became the rule of reasonable expectations. See article by Thomas J. Reuter and Joshua H. Roberts, *Pennsylvania's Reasonable Expectations Doctrine: The Third Circuit's Perspective* 45 Villanova Law Review 581, 583-584. The doctrine has been applied in various forms, one of which is akin to the ambiguity rule. Under that version of the doctrine, followed in many jurisdictions, courts "will defer to the reasonable expectations of the insurance consumer only in cases where the policy is ambiguous." (*Id.*, at 587). A second application of the doctrine arises from the bargaining advantage held by the insurer and the fact that an insurance contract is a contract of adhesion, which the consumer must take or leave, without any meaningful opportunity to negotiate terms. Under this application, courts have found even unambiguous policy language invalid, if it might be confusing from the standpoint of the typical consumer. A third application is a radicalization of the second: policy language, however clear, will be avoided when it would, in the court's view, defeat the essential objectives of insurance coverage. This is the nearest to the formulation arrived at by Professor Keeton which is set forth by Auto-Owners in its brief (page 24):

The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provision would have negated those expectations.

This particular application of the doctrine, it is said, even though rarely actually used, “has triggered the most significant debate over its theoretical validity.” (*Id.*, at 588).

Other scholars have categorized applications of the rule differently. An article in the University of Chicago Law Review by Stephen J. Ware, *A Critique of the Reasonable Expectations Doctrine*, 56 University of Chicago Law Review 1461, 1989, describes the different versions of the rule as the “ambiguity” version, which is essentially the construal of ambiguous terms in the insured’s favor; the “fine print” version, which refuses to enforce policy provisions buried, literally or figuratively, in the “fine print” of the policy; and the “whole transaction” version, in which policy provisions are not enforced where to do so would frustrate the reasonable expectations of an insured created by factors extrinsic to the contract. Justification of the doctrine is found primarily in two “powerful” factors: “(1) the ‘inequality of bargaining power’ between the parties to an insurance contract, and (2) the fact that insurers usually use long, complex policies with provisions over which the policyholder cannot negotiate.” *Id.*, at 1461. The article, itself generally critical of the doctrine, acknowledges its “almost uniform support” from the academic community (*Id.*, 1461).

Although Auto-Owners states in its brief that “the general trend among courts has been to reject Keeton’s analysis or ignore the doctrine altogether” (Page 25, Auto-Owners brief), one article published in 1998 contradicts that statement, holding instead that “(t)his early statement of what Professor Keeton recognized as an emerging principle has since evolved into a doctrine of law which a majority of courts who have considered

its adoption have accepted.” Mark T. Flickinger, *Protecting the Insured in Utah: Rethinking the ‘Interstitial’ Approach of Allen v Prudential Property and Casualty Insurance Co.*” 12 BYU Journal of Public Law 389, 390; see also the survey of adopting jurisdictions in *Max True Plastering Co v United States Fidelity and Guaranty Co.* 912 P.2d 861 (Okla. 1996). It can at least be stated that a majority of courts have adopted “some version” of the doctrine. Stephen J. Ware, *A Critique of the Reasonable Expectations Doctrine* *supra*.

Another article suggests that how the courts apply the doctrine is a function of their ideological bent, whether toward “formalism” or “positivism” which as its name implies proposes to employ purely formal criteria to the interpretation of the insurance contract and to avoid reference to extrinsic factors such as the intent of the parties when in conflict with the terms of the written contract, or toward “functionalism,” which stresses socially desirable consequences. Professor Peter Swisher, *Judicial Rationales in Insurance Law: Dusting Off the Formal for the Informal* 52 Ohio State Law Journal 1037, 1991. Importantly, however, the article notes that **both** schools observe the ambiguity rule:

There is no problem . . . under both the Formalist and Functionalist approaches to insurance contract interpretation whenever there are ambiguities within the policy. Under both views, whenever the insurance contract is susceptible to two or more reasonable interpretations, under the theory of *contra proferentum*, the policy will be strictly construed against the insurer who drafted the contract, and the policy will be liberally construed in favor of the non-drafting party, the insured. *Id.*, at 1052.

The two schools, the article goes on to say, differ in the application of the ambiguity rule in that the “functionalist” school tends to hold that the “reasonable expectations” of the insured will trump even *unambiguous* language in the insurance policy, while the “formalist” school declines to override clear and unambiguous policy

provisions that do not contravene public policy. It is not that the “formalist” courts have *rejected* a rule of reasonable expectations; they merely apply those expectations only after a determination is made that a policy provision is ambiguous.

#### **b. The Reasonable Expectations Rule in Michigan**

With this very brief overview of the history and present status of the “reasonable expectations rule,” we turn to the history and status of the doctrine in this state.

Auto-Owners correctly states that the doctrine was first explicitly articulated in this state in this Court’s opinion in *Zurich Insurance Co v Rombough* 384 Mich 228; 180 N.W.2d 775 (1970). In *Zurich*, the Court adopted the opinion of California Supreme Court Justice Tobriner in *Gray v Zurich Insurance Co* 65 Cal 2d 263; 419 P 2d 168 (1966). Although *Gray* was decided four years before Professor Keeton’s formulation of the doctrine, Justice Tobriner, perhaps prophetically, employed the term, saying:

Although courts have long followed the basic precept that they would look to the words of the contract to find the meaning which the parties expected from them, they have also applied the doctrine of the adhesion contract to insurance policies, holding that in view of the disparate status of the parties we must ascertain that meaning of the contract which the insured would reasonable expect.”

There is in this statement of the doctrine no explicit permission granted to the courts to rewrite contracts or to contravene policy provisions that are clear, unambiguous, and not violative of public policy.

In 1982 this Court decided the cases of *Raska v Farm Bureau Mutual Ins Co*, *supra*, and *State Farm Mutual Automobile Ins Co v Ruuska* 412 Mich 321; 314 N.W.2d 184 (1982). In *Raska* the Court found an “owned automobile” exclusionary clause

unambiguous and not violative of public policy, referring to the insured's "reasonable expectations" argument as follows:

Plaintiffs also assert that as drafted the policy did not meet their 'reasonable expectations.' Still the expectation that a contract will be enforceable other than according to its terms surely may not be said to be reasonable.

The exclusionary clause in *Raska* was in fact unambiguous, and the claim that it did not comport with the insured's "reasonable expectations" was based on his argument that the terms used: "owned" and "non-owned" – even though clearly defined in the policy – did not jibe with the "common" understanding of those terms. The Court essentially said that an insured's *subjectively held* opinion as to the meaning of a term could not trump its clear and unambiguous statement in the policy. The Court made plain its continuing adherence to the ambiguity doctrine.<sup>7</sup>

In *Ruuska*, the issue again revolved around an exclusionary clause which – unambiguously – stated that an insured, who would otherwise be covered while driving a "non-owned" vehicle, would not be covered where she resided in the same household with the vehicle's owner. In a plurality opinion, the Court invalidated the exclusionary clause. Justice Williams based his opinion on the exclusion's conflict with the no-fault act. Justice Levin, concurring, based his decision not on any claimed ambiguity but squarely on a finding that "the instant exclusion . . . is unconscionable and contrary to the reasonable expectations of the insured . ." *Id.*, at 343. Justice Levin acknowledged that his ruling might be characterized as "rewriting the policy," but stated that an insurer's power to draft the policy as it sees fit is "limited by the doctrines of unconscionability

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<sup>7</sup> The Court said: "A contract may be said to be ambiguous when its words may reasonable be understood in different ways. If a fair reading of the entire contract of insurance leads one to understand that there is coverage under particular circumstances and another fair reading of it leads one to understand there is no coverage under the same circumstances, the contract is ambiguous and should be construed against its drafter and in favor of coverage."

and reasonable expectations.” *Id.*, at 351. He refers in a footnote to Professor Keeton’s text, and his opinion is probably the closest that this Court has come to adopting the pure “reasonable expectations” doctrine as stated by Professor Keeton: the doctrine that would allow courts to override the plain and unambiguous language of a policy so as not to thwart an insured’s “reasonable expectations.”

In 1986, this Court again made reference to the “reasonable expectations” rule in another plurality decision, invalidating exclusionary clauses in a number of no-fault policies. In *Powers v Detroit Automobile Inter-Insurance Exchange* 427 Mich 602; 398 N.W.2d 411 (1986) Justice Williams, writing for the plurality, culled from Michigan precedents six rules of construction for insurance policies:

1. ‘Exceptions in an insurance policy to the general liability provided for are to be strictly construed against the insurer.’
2. An insurer may not ‘escape liability by taking advantage of an ambiguity . . .’ (and) ‘Wherever there are two constructions that can be placed upon the policy, the construction most favorable to the policyholder will be adopted.’
3. An insurer must ‘so . . . draft the policy as to make clear the extent of nonliability under the exclusion clause.’
4. An insurer may not ‘escape liability by taking advantage of . . . a forced construction of the language in the policy . . .’ (and) ‘Technical constructions of policies of insurance are not favored . . .’
5. ‘The courts have no patience with attempts by a paid insurer to escape liability by taking advantage of an ambiguity, a hidden meaning, or a forced construction of the language in a policy, when all questions might have been avoided by a more generous or plainer use of words.’
6. ‘Not only ambiguous but deceptive.’ The policyholder must be protected against confusing statement in policies.’  
*Id.*, at 623-624. Citations omitted.

Nowhere in these six rules of construction is the reasonable expectations doctrine referred to. They may in fact be characterized as essentially a restatement of the

ambiguity rule and other basic rules of contract interpretation. The Court in fact determined, independently of the rule of reasonable expectations, that the clauses at issue *were* ambiguous, and based its conclusion that they were invalid on this ambiguity. It is not until later in his opinion that Justice Williams makes specific reference to the rule of reasonable expectations, referring to it as an “adjunct” to the previously listed rules of construction and, in a footnote, stating that “Our understanding of reasonable expectations does not require an ambiguity as a prerequisite to the application of the doctrine.” *Id.*, at 424.

In *Vanguard Insurance Co v Clarke*, *supra*, at issue was the validity of a clause in a homeowners policy excluding coverage for injuries arising out of the operation of a motor vehicle. The insured had died in his garage, having left his car motor running. It had been recognized at both the trial court and the Court of Appeals levels that the clause was not ambiguous. This Court, while recognizing all of the rules regarding the construction of policy provisions where an ambiguity is present, nevertheless held that “Because no ambiguity exists regarding the exclusion in the case at bar, the insured cannot prevail on the basis of the rules of construction that favor coverage.” *Id.*, at 472.

But the Court continued:

The inquiry regarding coverage does not end with application of the rules of construction, however. This Court has also recognized that the rule of reasonable expectation comprises ‘an adjunct to the rules of construction of insurance contracts . ’ (citing *Powers*). This rule is particularly applicable in take-it-or-leave-it standardized contracts such as insurance policies.

Under the rule of reasonable construction, this Court will examine whether the policyholder, upon reading the contract language is led to a reasonable expectation of coverage.’ *Id.* at 632. n7. From a subjective standpoint, this inquiry is impossible to answer *ex ante* in the instant case. From an objective standpoint, however, the language of the insurance policy itself provides the best answer because it unequivocally prohibited liability for personal injuries ‘arising out of

the ownership, maintenance, operation, use, loading or unloading of . . any motor vehicle . . .’ Furthermore, the Clarke’s estate obtained indemnification under the automobile policy for the same transaction at issue under the homeowners policy. This indemnification provides strong inferential support that the insured had a reasonable expectation that the automobile policy covered the occurrence.

In effect, the reasonable expectations rule was in this case used *against* the insured.

In 1999, this Court decided the case of *Farm Bureau Mutual Insurance Co. v Nikkel* 460 Mich 558; 596 N.W.2d 915 (1999). Again, at issue was a policy exclusion related to coverage for “owned” and “non-owned” automobiles. The Court specifically “repudiate(d) the plurality opinion in *Powers*,” and held the non-owned automobile exclusion to be unambiguous.

The Court’s repudiation of *Powers* was not directly of the reasonable expectations rule per se, or of the various rules of construction cited in *Powers*, but at its finding – arrived at by the *use* of the reasonable expectations doctrine – that the exclusionary clause at issue was ambiguous. This is clear from the fact that its repudiation of *Powers* followed immediately upon the decision’s discussion of whether the exclusion was ambiguous, and from the sentence in which it announced its repudiation:

We repudiate the plurality opinion in *Powers*, supra, and hold that the nonowned automobile clause of the policy involved in this case is unambiguous. *Id.*, at 566.

It is clear from *Nikkel* that the Court is disenchanted with the “functionalist” or “Keetonian” version of the rule, for it says:

. . . We decline defendant’s invitation to discern ambiguity solely because an insured might interpret a term differently than the express definition provided in a contract. . . To the extent that the plurality in *Powers* gleaned ambiguity by relying on an understanding of the term that differed from the clear definition provided in the policy, *Powers* is contrary to the most fundamental principle of contract interpretation – the court may not read ambiguity into a policy where none exists. *Id.*, at 567-568; citations omitted.

And later:

Finally, we conclude that the *Powers* plurality improperly relied on the rule of reasonable expectations to defeat the unambiguous policy language. In *Vanguard* . . . this Court explained that, under the rule, it ‘will examine whether “the policyholder, upon reading the contract language, is led to a reasonable expectation of coverage.”’ This Court also expounded on the factors involved in the determination:

Factors courts consider in determining the legitimate existence of reasonable consumer expectation include ‘whether an insurance policy includes a provision that unambiguously limits or excludes coverage and . . . whether a policyholder could have sufficiently examined an insurance policy, so as to discover a relevant clause which limits the coverage.’ *Id.*, at 472, n. 7.

The Court also stated:

Under *Vanguard*, the rule of reasonable expectations has no applicability here because no ambiguity exists in the nonowned automobile clause **and** the insured could have discovered the clause on examination of the contract. *Id.*, at 569

This last sentence, couched in the conjunctive, is not intended to add a second requirement over and above the requirement of ambiguity to the insured’s burden of attacking clauses that limit or exclude coverage, but instead must be intended to provide an alternative theory for attack. The fact that these inquiries may usually overlap, and yield the same result, does not mean that there is not a distinction to be made between them. In a word, the present status of the reasonable expectations rule in this state is that it is a rule that can be used to aid the interpretation and construction of a policy provision that has been determined to be ambiguous **and** can be used to invalidate policy provisions that could not have been discovered upon a reading of the policy.

Auto-Owners contends that the rule, so limited, adds nothing to general rules of contract interpretation, including the ambiguity rule, that are available independently of the rule. It therefore, Auto-Owners contends, should be eliminated.

But a fair reading of the cases referred to, and of cases from other jurisdictions which appear to follow the rule in similar fashion, suggest that the rule does add to the

general rules of contract interpretation an extra layer of special scrutiny of insurance policy provisions – an added scrutiny based on the recognition that insurance policies are simply unlike contracts negotiated by parties, with respect to which there is an actual “meeting of the minds.” The rule, as limited and articulated in *Vanguard* and *Nikkel*, asks: if a policyholder were to examine the policy, would he or she have “discovered” that a coverage was limited or excluded?

As applied to this case: if these Plaintiffs, the “insureds” under the policy, had read this provision, would they have come to the belief (“discovered”) that each of their individual recoveries under the UIM endorsement would be offset by the entire limits of the single limit policy of the owner or operator of an underinsured vehicle? The Plaintiffs respectfully state that they would not have made this discovery.

Plaintiffs-Appellees also contend that the issue of the existence and form of the rule of reasonable expectations is not an issue that need be reached and decided in the Court’s consideration of this appeal, for it is easily decided on the basis of arguments presented in Arguments A and B of this brief.

## **RELIEF REQUESTED**

Plaintiff-Appellee Janna Frank respectfully requests that this Honorable Court affirm the decision of the Court of Appeals.

Respectfully submitted

Grua, Jamo, and Young, P.L.C.

By: 

Jonathan E. Maire (P-16999)

Attorney for Plaintiff-Appellee Frank  
2401 E. Grand River Ave.  
Lansing, MI 48912  
(517) 487-8300

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